

**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

IN THE MATTER OF )  
LICENSE NO. 45-7385 ) **PRELIMINARY ORDER**  
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On December 14, 2012, the Director (“Director”) of the Idaho Department of Water Resources (“Department”) issued his *Final Order Adding Clarifying Language to Assist the Department in Administration of Water Rights Entitled to Qualified Subordination (Appendix B List)* (“Final Order”) in the matter of water right no. 45-7385. The clarifying language was added to assist the Department in water right administration by making it easier to determine, based upon the face of the water right, which water rights do not receive the benefit of unqualified subordination under the Swan Falls Agreement and the Contract to Implement Senate Bill 1180 (“1180 Contract”).<sup>1</sup> A condition with the clarifying qualified subordination language was added to water right no. 45-7385 and to other water rights within the trust water area which have priority dates senior to October 25, 1984, but which did not have beneficial use or substantial investment<sup>2</sup> prior to October 25, 1984.

On December 31, 2012, the Department received a request for a hearing (“hearing request”) in regard to the Final Order from Wayne O. Hurst (“Hurst” or “right holder”). Mr. Hurst requested a hearing to provide evidence that water was put to beneficial use or a substantial investment was made in development of the water right prior to October 25, 1984.

On March 19, 2013, the Department held a hearing in response to the right holder’s hearing request. The Department held the hearing to consider whether water under water right no. 45-7385 was put to beneficial use prior to October 25, 1984; or, whether a substantial investment was made in the development of water right no. 45-7385 prior to October 25, 1984.

After considering the evidence in the administrative record, the Hearing Officer finds, concludes, and orders as follow:

**FINDINGS OF FACT**

1. The Department issued a license for water right no. 45-2731 on September 10, 1973. The license confirmed a right to the use of ground water for irrigation use in the amount of 1.09 cfs, with a priority date of September 19, 1966. The authorized point of diversion was listed on the license as Township 12 South, Range 25 East, Section 8, SE1/4 of the NE1/4, Boise Meridian. The authorized place of use on the license was listed as 22 acres in the NE1/4 of the NE1/4, 11 acres in the NW1/4 of the NE1/4, 8 acres in the SW1/4 of the NE1/4 and 23

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1. The history and effect of the Swan Falls Agreement and the 1180 Contract are described in greater detail in the Final Order and will not be repeated in this order but are adopted herein by reference.

2. Substantial investment was defined in the 1180 Contract as the expenditure of \$15,000 or 25% of the total projected cost of developing the permit.

acres in the SE1/4 of the NE1/4; all in section 8 of Township 12 South, Range 25 East for a total of 64 acres.

2. The beneficial use field report made on August 3, 1971 for licensing of water right no. 45-2731 confirmed diversion of ground water from a 305-foot well with a Layne and Bowler Vertiline Pump, model no. 10EHL (serial no. D22937) and a U.S. Motors Holloshaft 40 horsepower motor (serial no. R1003267).
3. The Department granted a permit to begin development of water right no. 45-7385 on October 31, 1979. The Department issued a license for water right no. 45-7385 on November 2, 1994. The license confirmed a right to the use of ground water for irrigation use in the amount of 1.68 cfs, with a priority date of August 20, 1979. The authorized point of diversion was listed on the license as Township 12 South, Range 25 East, Section 8, SE1/4 of the NE1/4, Boise Meridian. The authorized place of use listed on the license was listed as 32 acres in the NE1/4 of the NE1/4, 32 acres in the NW1/4 of the NE1/4, 40 acres in the SW1/4 of the NE1/4, 39 acres in the SE1/4 of the NE1/4, 28 acres in the NE1/4 of the NW1/4 and 17 acres in the SE1/4 of the NW1/4; all in section 8 of Township 12 South, Range 25 East for a total of 188 acres.
4. The license for water right no. 45-7385 was issued with conditions, including the following:
  - This right uses the same well as Right 45-02731 and when combined with Right 45-02731 shall not exceed a diversion rate of 1.68 cfs nor a combined annual diversion volume of 713 af.
  - This right is limited to the irrigation of 124 acres within the place of use described above in a single irrigation season.
5. On December 14, 2012, the Director issued a Final Order to add clarifying language to water rights, including water right no. 45-7385, entitled to qualified subordination under the Swan Falls Agreement and 1180 Contract. The clarifying language stated the following:

This water right enjoys the benefit of subordination of hydropower water right nos. 02-00100, 02-4000A, 02-4001A, 02-02032A, 02-4000B, 02-4001B, 02-02032B, 02-02036, 02-02056, 02-02065, 02-02064, 02-10135, 02-02060, 02-02059, 02-02001B, 02-02001A, 02-02057, 37-02128, 37-02472, 37-02471, 37-20710, 37-20709, 36-02013, 36-02018 and 36-02026 only so long as the average daily flows as measured at the Murphy Gaging Station meet or exceed the minimum stream flows established by state action.

6. Wayne and Sherrie Hurst are the current owners of water right nos. 45-2731 and 45-7385.

#### **Evidence Related to Development of Water Right 45-7385**

7. On August 30, 1984, the Department granted an extension of time until October 1, 1989, to submit proof of beneficial use in connection with the permit for water right no. 45-7385. In the extension request, the permit holder stated that he had spent \$3,500 in connection with the development for the following work: “100 acres cleared of sagebrush and prepared for cultivation.”

8. On June 9, 1989, the Department received a completed Trust Water Information Questionnaire from the permit holder for water right no. 45-7385. In the questionnaire, the permit holder indicated that irrigation had not occurred under the permit prior to July 1, 1985 and no acres had been irrigated under the permit since July 1, 1985.
9. On October 4, 1989, the Department granted an extension of time until October 1, 1991, to submit proof of beneficial use in connection with the permit for water right no. 45-7385. In the extension request, the permit holder stated that he had spent \$8,300 in connection with the development for the following work: “[g]round cleared of sagebrush (as in 1984), plus 15 acres now in dryland [sic] hay with mainline pipe laid for future irrigation purposes.”
10. Well construction records of the Department include a Well Driller’s Report dated March 14, 1990 confirming that the well associated with water right nos. 45-2731 and 45-7385 was deepened to 745 feet. At the hearing, Hurst provided a copy of a billing statement to clean out and deepen the well at a cost of \$5955.10 (Exhibit 12).
11. On May 7, 1991, Department staff completed a field exam to confirm beneficial use of water in connection with the permit for water right no. 45-7385. The field examiner prepared a beneficial use field report dated July 30, 1991 to document the results of the field exam. The field examiner reported that the “[d]evelopment represents an expansion of License 45-2731....” The field examiner’s system description included a well, pump, booster pump, and portable mainline with 6 hand lines (hand-move sprinkler lines). The field examiner confirmed that the well, pump and motor used in connection with the permit were the same well, pump and motor used for water right no. 45-2731. The booster pump would have been added to the system at some time after water right no. 45-2731 was developed. The field examiner also confirmed that 124 acres were added under the permit to the place of use found to be irrigated under water right no. 45-2731 for a combined total of 188 acres.
12. At the hearing, Hurst testified that he began farming the land associated with water right no. 45-7385 in 1996 and the system included 5 hand lines and 2 wheel lines (wheel-move sprinkler lines) to irrigate the place of use. Hurst did not have receipts or other records of purchases associated with the sprinkler system, but he estimated that the cost would have been about \$1,000 per hand line and \$4,000 to \$5,000 per wheel line.
13. The additional sprinkler line and the use of wheel lines at the 188-acre place of use for water right nos. 45-2731 and 45-7385 must have occurred after the 1991 field exam, but before Hurst began farming the land in 1996. The cost of the additional sprinkler line and the use of wheel lines should not be considered in the total project cost associated with development of water right no. 45-7385 because the changes occurred after the end of the authorized development period for the water right.
14. The 6 hand lines covering the 188-acre place of use should be prorated between the 64 acres authorized under water right no. 45-2371 and the additional 124 acres authorized under water right no. 45-7385. Therefore, only the cost of 4 hand lines ( $124/188 \times 6$ ) can be attributed toward the total project cost under water right no. 45-7385. At \$1,000 per hand line, the cost of the sprinkler lines associated with water right no. 45-7385 is \$4,000.
15. Additional costs associated with development of water right no. 45-7385 include: an application fee of \$55 paid on August 20, 1979, a \$15 fee to submit a Request for Extension

of Time paid on August 17, 1984, a \$15 fee to submit a Request for Extension of Time paid on August 21, 1989, an application amendment fee of \$20 paid on April 26, 1991 and a \$125 fee submitted for a Proof of Beneficial Use Statement paid on April 26, 1991.

## ANALYSIS

Development of the permit for water right no. 45-7385 began after the permit was granted in 1979. At the hearing, Hurst provided receipts for purchases associated with development of the well and pumping system; however, most of the purchases were made in the late 60's associated with development of water right 45-2731. Costs associated with development of the permit for water right no. 45-7385 are limited to purchases made since 1979, including permitting fees, preparation of the land, deepening of the well, a booster pump and motor, installation of mainline, and sprinkler lines for the 124 acres added by the water right.

To enjoy the benefits of unqualified subordination for water right no. 45-7385, water must have been applied to beneficial use on the additional lands authorized by water right no. 45-7385 prior to October 25, 1984; or, a substantial investment of either \$15,000 or 25% of the total project cost must have been made prior to October 25, 1984. Since it is clear from the record that water was not applied to beneficial use prior to October 25, 1984; then water right no. 45-7385 is only entitled to unqualified subordination if one of the two prongs of the substantial investment was met. Thus, a review of the project costs is necessary.

It is clear from the record that the pre-October 25, 1984 expenditures did not meet or exceed \$15,000. In the August 30, 1984 request for extension of time to submit proof of beneficial use, the permit holder stated that he had spent \$3,500 in connection with the development. The only other pre-October 25, 1984 expenditures in the record for water right no. 45-7385 include the application fee of \$55 paid on August 20, 1979 and the \$15 fee to submit a Request for Extension of Time paid on August 17, 1984. This total of \$3,570 is the only evidence of pre-October 25, 1984 expenditures in the record and is well below the \$15,000 threshold.

To determine if 25% of the total project cost was invested prior to October 25, 1984, the total project cost should be known. Information in the water right file, along with receipts and testimony provided by Hurst at the hearing confirms a project cost of at least \$18,485: \$8,300 for clearing ground and installing the mainline; \$5,955 for deepening the well; \$4,000 for sprinkler lines; and, \$230 for filing fees.<sup>3</sup> A 25% investment would require that at least \$4,621 would have been spent prior to October 25, 1984. Since only \$3,570 was invested prior to October 25, 1984, the 25% investment requirement was not met.

At the hearing, Hurst expressed his concern regarding the determination that water right no. 45-7385 was considered to have a post-1984 priority date. He understood that the prior water right owners who developed the water right were granted extensions to develop the water right and therefore preserved the original 1979 priority date. The original 1979 priority date of water right no. 45-7385 is unchanged. Idaho Power's subordinated hydropower water rights all pre-date 1979; however, the Swan Falls Agreement and 1180 Contract provided that those senior priority hydropower rights would be subordinated to later in time water rights. The type of

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3. Not all components of the total project are known and costs were not provided for all known components. For example, the cost of the booster pump and motor was not provided. Any additional costs would only raise the total project cost resulting in a higher threshold to meet the 25% investment requirement prior to October 25, 1984.

subordination is at issue here. To enjoy the benefits of unqualified subordination of the hydropower rights, beneficial use or substantial investment must have occurred prior to the 1984 date. Those water rights developed after the 1984 date still benefit from qualified subordination. Qualified subordination means that even though the rights are junior to Idaho Power's hydropower rights, they can continue to divert water at times when the hydropower rights are not fully satisfied, as long as the established minimum stream flows are being met.

### CONCLUSIONS OF LAW

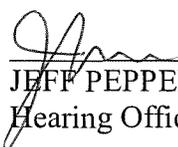
1. In order to benefit from unqualified subordination of the hydropower water rights of the Swan Falls Agreement and 1180 Contract, beneficial use of water or substantial investment, as defined in the 1180 Contract, must have occurred under water right no. 45-7385 prior to October 25, 1984.
2. Water right no. 45-7385 was not put to beneficial use prior to October 25, 1984. Nor was there substantial investment made in the development of the water right as defined in the 1180 Contract.
3. Water right no. 45-7385 is not entitled to unqualified subordination of the hydropower water rights of the Swan Falls Agreement and 1180 Contract.
4. Water right no. 45-7385 diverts water that was first appropriated under the hydropower water rights held in trust by the State, and is a "trust water right." Water right no. 45-7385 benefits from qualified subordination of the hydropower water rights of the Swan Falls Agreement and 1180 Contract.

### ORDER

Based on the foregoing, IT IS HEREBY ORDERED that the following language is added to the license for water right no. 45-7385:

This water right enjoys the benefit of subordination of hydropower water right nos. 02-00100, 02-4000A, 02-4001A, 02-02032A, 02-4000B, 02-4001B, 02-02032B, 02-02036, 02-02056, 02-02065, 02-02064, 02-10135, 02-02060, 02-02059, 02-02001B, 02-02001A, 02-02057, 37-02128, 37-02472, 37-02471, 37-20710, 37-20709, 36-02013, 36-02018 and 36-02026 only so long as the average daily flows as measured at the Murphy Gaging Station meet or exceed the minimum stream flows established by state action.

DATED this 9<sup>th</sup> day of April, 2013.

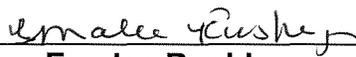
  
JEFF PEPPERSACK  
Hearing Officer

## CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2013, I mailed a true and correct copy, postage prepaid, of the foregoing PRELIMINARY ORDER to the persons listed below:

RE: Preliminary Order in the Matter of Water Right No. 45-7385

WAYNE HURST  
SHERRIE HURST  
273 S 750 E  
BURLEY ID 83318

  
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**Emalee Rushing**  
**Administrative Assistant**

## **EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER**

**(To be used in connection with actions when a hearing was held)**

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and brief as further described below:**

### **PETITION FOR RECONSIDERATION**

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5243(3) Idaho Code.

### **EXCEPTIONS AND BRIEFS**

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

### **ORAL ARGUMENT**

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

## CERTIFICATE OF SERVICE

All exceptions, briefs, request for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 302 and 303.

### FINAL ORDER

The Department will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The Department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

### APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.